FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-5729

MARK DAVID OLIPHANT AND
DANIEL B. BELGARDE, *Petitioners*,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION AND SUMMARY

A. The Scope of the Tribal Power Being Asserted Over the Petitioners.

The Suquamish Law and Order Code by its terms asserts comprehensive criminal jurisdiction over all persons on the Port Madison Reservation

including approximately 3,000 non-Indian residents.[1] Yet these non-Tribal members are completely disenfranchised by the Tribe. They cannot participate directly or indirectly in making the law to which they are asserted to be subject; they are ineligible to be judges of the Suquamish tribal court; they cannot serve as members of juries in that court.

Quite correctly, the United States compares them to aliens "residing in a foreign country," even though they are United States citizens residing in the United States (U.S. Br. 45)

The situation is "uncomfortable," to say the least (Cf., U.S. Br. 46). Indeed, the Tribe's attempt to subject these non-Indians to a legal system in which they can have no voice is, we submit, unconstitional. For this attempt to treat United States citizens as "aliens" in their own country is completely repugnant to the Fifth and Fifteenth Amendments to the Federal Constitution.

In an apparent effort to ameliorate this "uncomfortable" situation, the Tribe and the United States seem to suggest that the scope of the tribal power they here assert is markedly less than that

[1]The Code includes 71 separately defined crimes. (Ch. III, Art. I, §§1-71; Pet. App. 27a-45a.) The only type of major crime typically found in a state criminal code but omitted from the Tribal Code is homicide. Under Ch. I, Art. III, § 3(a) of the Code, the Tribal Court's jurisdiction extends to all crimes defined by the Tribal Code when committed by any person anywhere on the reservation, with one important exception. Jurisdiction does not extend to "major crimes" which are within the jurisdiction of the federal government pursuant to 18 U.S.C. 1153. (Pet. App. 22a, 23a) Since 18 U.S.C. 1153 applies only to "major crimes" committed by Indians, the application of the Code to non-Indians is actually more comprehensive than its application to Indians. The Code thus removes the partial overlap between the Code and federal law—but only for Indians.

possessed by a general purpose government, such as a state, city or county, and perhaps even less than the power which the Tribe asserts in its Code. The limiting standard which they propose is that of a "sufficient tribal interest." (Tribal Br. 5, 53; U.S. Br. 11, 18, 19)

This standard is so vague that it cannot "precisely fix the boundaries of tribal jurisdiction" (U.S. Br. 10) and accordingly will require "a case by case development," (Tribal Br. 53); nevertheless, they argue that the standard is unquestionably satisfied here. After all, Mr. Oliphant allegedly assaulted a tribal police officer, and Mr. Belgarde allegedly damaged a tribal police car. (U.S. Br. 11)

Such an argument, however, starts at the wrong place. Mr. Oliphant was allegedly engaged in an altercation which involved, so far as the record shows, only non-Indians; and tribal police tried to break it up. Mr. Belgarde was allegedly speeding through the community of Suquamish, on a public road. Tribal officers tried to stop him.

Unless the Tribe may validly assert criminal jurisdiction over such events—allegedly disturbing the peace in the case of Mr. Oliphant and allegedly speeding or reckless driving on a public road in the case of Mr. Belgarde—then the tribal police who became involved must be considered as ordinary civilians. That a tribal police car may have been damaged, and that a tribal police officer was allegedly assaulted, is beside the point.

The validity, then, of the Tribe's claims to criminal power in these cases must stand or fall on the basis of its claim to criminal power over the events which prompted the intervention of the tribal police —the disturbing of the peace and the speeding or reckless driving. The attempts of the Tribe and the United States to make their claims appear very narrow, by focusing on an alleged assault to the tribal officer and the damage to the tribal police car, are essentially a sham.[2]

B. **The Basis for the Assertion of Tribal Criminal Power.**

1. *The Starting Point for the Argument of the Tribe and the United States.*

Understanding the breadth of the Tribe's jurisdictional claims is critical; but understanding the precise source of those claims is even more critical.

The source of tribal power is not any provision of the Treaty of Point Elliott. 12 Stat. 927. Nor is it any federal statute.

The source of the power here claimed is not to be found in any written document at all;[3] rather, it is predicated upon the Tribe's *status*—a status supposedly antedating the Treaty of Point Elliott in

[2]The United States admits as much, when it states that its "solution * * * the *McBratney* exception aside, subjects *everyone* [Indian and non-Indian alike] within the reservation boundaries to the *same laws* and the *same courts for like offenses*." (U.S. Br. 38, emphasis supplied) We agree that this would be exactly the result if the "solution" of the United States and the Tribe is adopted, with but one exception. As mentioned at note 1, p. 2, supra, the Code does not apply to crimes committed by Indians when those crimes are also within the scope of the Major Crimes Act, 18 U.S.C. 1153. In contrast, a non-Indian would be subject to the Tribal Code for those same crimes.

[3]It does not even appear in the tribal constitutions adopted in 1916 and 1965. (Pet. App. 4a-6a)

1855 and still existing in 1977. The status claimed is no less than that of a sovereign nation.

The Tribe--like any other sovereign nation—may regulate the conduct of all persons within its territorial jurisdiction, while confining participation in its government to its own "citizens," *i.e.*, to tribal members. The source of the Tribe's claim thus explains the startling breadth of that claim.

The Tribe and the United States admit that federal statutes and treaty provisions are relevant, but only in determining whether any attributes of this "sovereignty" have been taken away by the federal government. Under their theory, one does not look to statutes or treaty provisions to see if any attributes of sovereignty were somehow conferred or recognized in treaty or statute. One looks to these provisions only to see if those attributes have been expressly surrendered or taken away. Unless so surrendered or taken away, all attributes of sovereignty remain with the Tribe.

This is the essential starting point of the whole argument of the Tribe and the United States. And the argument falls, we submit, precisely at this first step.

2. *Examination of the Starting Point.*

The first problem with this starting point is essentially one of logic. If the legal function of a treaty with an Indian tribe is to withdraw attributes of sovereignty, rather than confer them, it would follow that all those tribes which have never entered

into any treaty at all are in the best legal position of all.[4] For they have surrendered *no* attributes of their inherent sovereignty.[5]

This would be an anomalous result, to say the least.

Moreover, this argument was repudiated more than 150 years ago in *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823). In an opinion by Chief Justice Marshall, this Court denied to a non-treaty tribe a basic attribute of any sovereign nation, the right to own and convey land.

Secondly, this starting point is based on a complete misapplication of Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and amounts to mere legal "boot strapping."

Chief Justice Marshall analyzed the provisions of the various treaties entered into with the Cherokee nation and, on the basis of those treaty provisions, concluded that the United States had thereby recognized the Cherokee nation as having a type of sovereign status. Among those treaty provisions were some which expressly conferred tribal criminal jurisdiction over non-Indians.[6]

[4]Non-treaty tribes are not uncommon in the Pacific Northwest. See *Duwamish et al. Indians v. U.S.*, 79 C. Cls. 530, 597 (1934), *cert. den.* 295 U.S. 755. By reason of the Act of Mar. 3, 1871, Ch. CXX, 16 Stat. 566, these non-treaty tribes are now precluded from becoming treaty tribes.

[5]The Congress, of course, could take those attributes away from the non-treaty tribes by statute.

[6]Art. V of the Treaty of Hopewell, 7 Stat. 18, (1785) provides as follows:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted [to] the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, *such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please*: * * * (Emphasis supplied)

Article VIII of the Treaty of Holston, 7 Stat. 39 (1791) is essentially the same.

But the Tribe and the United States would read Marshall's opinion as saying that *all* Indian tribes have such jurisdiction, *even in the absence of such express treaty provisions.*

They would read Marshall's opinion as saying that the Cherokee Nation, for example, would have had criminal jurisdiction over non-Indian Americans *even if the provisions in the Cherokee treaties by which this jurisdiction was granted did not exist.*

Chief Justice Marshall's opinion says no such thing; and to suggest that it does is legal nonsense. But that reading of Marshall's opinion is the necessary underpinning for the whole argument of the Tribe and the United States.

Congress, fortunately, has never indulged in such nonsense. In enacting 18 U.S.C. 1152 and its predecessors, Congress recognized that provisions such as those in the Cherokee treaties granted tribal jurisdiction — often exclusive tribal jurisdiction — over non-Indians. The effect of such provisions was preserved through the "treaty exception" in § 1152. But in the absence of such provisions, non-Indians were exclusively subject to federal law (or state law, pursuant either to the *McBratney* exception or P.L. 83-280). Cf., *Ex Parte Mayfield*, 141 U.S. 107

(1891) which explains most clearly the congressional policy embodied in § 1152.

Nor has the Attorney General of the United States or the Interior Department ever indulged in such nonsense—until now. The opinions of these two agencies have consistently held, from 1834,[7] that in the absence of treaty provisions expressly granting such jurisdiction, tribal criminal jurisdiction over non-Indians does not exist.

Thirdly, even if one accepts the reading of *Worcester* urged by the United States and the Tribe, that reading would still be inapplicable to the tribes of the Puget Sound area, such as the Suquamish. To view those tribes as having been sovereign nations is to ignore historical reality.

The reality is this:

> No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, *deliberately created political entities* for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA-27a, pp. 14-29; Ex. USA-20, p. 28] *U.S. v. Washington*, 384 F. Supp. 312, 355. (Emphasis supplied)

To the extent, then that the "Tribes" of the Puget Sound area constitute governmental bodies,

[7]Cf., 2 Op. Atty. Gen. 693 (1834).

they are purely and simply the creatures of the federal government. Their creation included appointment by federal agents of chiefs and sub-chiefs, all for the purpose of organizing the Indians to facilitate their removal from their individual villages and onto the reservations, out of the way of the white migration.[8] The Indians were a people to be protected, not sovereign nations.

Fourthly, the argument of the Tribe and the United States collides with another historical fact. Provisions explicitly granting to Indian tribes criminal jurisdiction over non-Indians were common in the early treaties. The provisions in the early Cherokee treaties, discussed at p. 6, *supra*, are but two examples. Altogether, there were nine treaties containing such a provision. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 531, n. 128 (1976).

But all of these treaties were signed before 1796. No treaties thereafter contained any such provision. And this provision was later abrogated for most, though not all, of the original nine. Clinton, *ibid*, at 531, n. 130.

When it was the policy of the United States that its citizens should be subject to the criminal laws of an Indian tribe, that policy was expressly stated in a treaty. Further, that policy was deliberately

[8]We attach as Appendices A and B those portions of Ex. USA 20 and Ex. USA 27a referred to in the quotation from *U.S. v. Washington*, 384 F. Supp. 312, aff'd. 520 F.2d 676, cert. den. 423 US 1086, ren. den. 424 US 978. Both exhibits were prepared by Barbara Lane, Ph.D., the anthropological expert witness for the United States.

discarded before the end of the 18th century. Yet the argument of the Tribe and the United States would resurrect it, under the guise of tribal sovereignty.

3. *The Starting Point of the Petitioners: McClanahan v. Arizona Tax Commission.*

The starting point of the Tribe and the United States, inherent Indian tribal sovereignty, has been aptly described by this Court as a "Platonic notion [s]." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973):

> The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., United States v Kagama, 118 US 375, 30 L Ed 228, 6 S Ct 1109 (1886), with Kennerly v District Court, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971). 411 US at 172.

As in *Worcester*, so also in *McClanahan* the issue was the applicability of state law to an Indian reservation. Yet even in this context, "platonic notions" cannot provide a substitute for non-existent statutory or treaty language. Such notions only provide a "backdrop" against which treaty or statutory language must be read. *Ibid.*[9]

The approach taken in *McClanahan* should be taken in this case as well. If a power claimed by an Indian tribe cannot be found in a fair reading of a

[9]The approach taken in *Worcester* and that taken in *McClanahan* are, we submit, essentially the same. The rights of an Indian tribe are to be determined from a reading of the applicable treaties and statutes. *McClanahan* is rejecting only intervening glosses upon *Worcester*, not its reasoning and holding.

treaty or statutory provision, the power does not exist; "platonic notions" cannot supply that power.

McClanahan also shows both the proper source and the true nature of Indian tribal self-government —as distinguished from tribal "sovereignty." The primary source of tribal self-government is the typical treaty provision setting aside a geographical area for the exclusive use of the Indian tribe and its members. This provision blocks the application of state law, including state tax law, to reservation Indians. For the treaty right is, in essence, the right to be left alone.

Further, recognition of this limited right to self-government fits with historical realities. All Indians, including those of the Puget Sound area, were in a real sense a separate people, pursuing their separate mode of life before the non-Indian came. Treaties such as the Treaty of Point Elliott were intended to allow the Indians to continue this separate mode of life, but within the confines of the reservation.

To continue to be treated as a separate people is quite different from being treated as a sovereign nation, as the history of the Puget Sound Tribes reminds us. And similarly the right to be free from non-Indian law is quite different from the power to subject a non-Indian to Indian law.

Unless the *McClanahan* approach be adopted in this case, insoluble dilemmas are created.

To subject non-Indians to the general governmental power of a tribe, including tribal criminal

power, while denying them the right to participate in Indian government through the franchise, would constitute a violation of the non-Indians' constitutional rights under the Fifth and Fifteenth Amendments. Yet, as the situation on the Port Madison reservation illustrates, to grant the non-Indians the franchise would effectively destroy tribal self-government; for the non-Indian residents vastly outnumber the tribal members.

If the "platonic notion" of tribal sovereignty is adopted, this dilemma is unavoidable. Under the *McClanahan* approach, however, it does not arise. Since no treaty or statutory provision grants this criminal power over non-Indians, the power does not exist. And tribal self-government, as so confined, can continue to exist.

A similar dilemma arises on the procedural level. Non-Indians are not only disenfranchised, but they are disqualified from serving on Suquamish Tribal juries as well. A constitutionally valid trial for the petitioners in the tribal court is impossible. *Reid v. Covert*, 354 US 1 (1957). The constitutional defect might be curable, by placing non-Indians on tribal juries. But again, there is a cost—a diminution in tribal self-government. The dilemma can only be avoided by confining the jurisdiction of tribal courts to tribal members.

The *McClanahan* approach also provides an accommodation between the right of the Indians to tribal self-government and the expectations of the

non-Indian residents on the Port Madison Reservation—expectations fostered by the federal government.

Until now, the position of both the Attorney General and the Department of Interior has been that Indian tribes do not have criminal jurisdiction over non-Indians. Whether that position has been consistently correct or, as suggested by the United States, consistently incorrect is irrelevant to our point.[10] The fact is that this has been the consistent position conveyed by the administrative agencies of the United States government to the citizens of the United States.

Moreover, despite all the twistings and turnings of federal Indian policy, the Congress itself has never suggested that this position was incorrect.

The *McClanahan* approach also parallels exactly the decisions of this Court involving Indian land claims. For an Indian tribe to establish a compensable claim to land, there must be congressional recognition, expressed in a treaty or statute, of the tribe's right to own a specific portion of land. Absent such recognition, the tribal right does not exist and the claim must be denied. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955). Platonic notions of Indian sovereignty will not serve to unlock the federal treasury; the key must be found in specific statutory or treaty language. No less strict a standard should

[10]See U.S. Br. 41-43, discussing 2 Op. Atty. Gen. 693 (1834), 7 Op. Atty. Gen. 174 (1855) and 77 I.D. 113.

apply to tribal claims of criminal power over non-Indians.

As the foregoing shows, our disagreements with the Tribe and the United States are total; they relate as much to the questions to be asked as to the answers to be given. For example, the United States asserts the "principal issue" to be "* * * whether 18 U.S.C. 1152 ousts tribal jurisdiction * * * in favor of exclusive federal jurisdiction." (U.S. Br. 12)

This is not the principal issue at all. The issue of the effect of 18 U.S.C. 1152, though important, is subsidiary. Certainly, we contend that if jurisdiction of the type asserted here ever existed, § 1152 ousted it. But the primary lesson to be learned from § 1152 is that Congress never recognized such jurisdiction as existing in the first place.

ARGUMENT

A. An Indian Tribe Has only those Attributes of Sovereignty Granted by a Treaty or Statute. Absent Such a Grant, They Do Not Exist.

1. *The Status of an Indian Tribe in the Absence of a Treaty—The Indian Land Cases.*

The underlying assumption of the Tribe and the United States is that every Indian tribe was once a sovereign nation, with all the attributes of sovereignty. A treaty merely recognizes this pre-existing sovereign status, which remains undiminished unless expressly diminished by the treaty itself. This assumption is the basis of their entire argument. If this assumption fails, the argument fails.

Let us test out this assumption.

Surely one of the principal attributes of a sovereign nation is the power to own and dispose of its land to whomever it wishes. Yet, in his seminal opinion dealing with the powers of an Indian tribe, Chief Justice Marshall denied that power.

"The great case of *Johnson v. McIntosh*, 8 Wheat 543, denied the power of an Indian tribe to pass their right of occupancy to another." *Tee-Hit-Ton Indians v. U. S.*, 348 U.S. 272, at 279, 280 (1955). Indeed, *Johnson* denied not just the power to pass the right of occupancy, but the power to own and pass title as well.

The reason for this result is as important as the result itself. In his Commentaries on the Constitution (5th Ed. Boston, 1891), written in 1833, Justice

Story explains the origin of the law of Indian title as follows:

> We have also seen that the title of the Indians was not treated as a right of propriety and dominion, but as a mere right of occupancy. * * * *they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.* * * * (Emphasis supplied) Vol. I, p. 106.

From what source, then do Indian tribes receive any attributes of sovereignty, such as the power to own and pass title to land? For they certainly do not receive this attribute from a judicially recognized preexisting status as sovereigns.

The answer can be found, we suggest, by examining modern applications of *Johnson v. M'Intosh*, *supra*. *Tee-Hit-Ton Indians v. U.S.*, *supra*, is just such an example.

This case involved a claim for compensation under the Fifth Amendment by a clan of the Tlingit Tribe in Alaska for a taking by the United States of timber from lands allegedly belonging to the clan. The United States argued that Congress had never recognized any compensable interest, and that accordingly no compensation was due. Since there was no applicable treaty, the question became whether there was a statute recognizing such an interest, i.e., a right of permanent occupancy. This Court held that there was not, stating,

> * * * There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways *but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.* * * * (Emphasis supplied) 348 U.S. 272, at 278, 279.

The same rule applies with respect to treaties; absent language which can be fairly read as recognizing the Indians' legal right of permanent occupancy, it does not exist. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945). Aboriginal Indian title to land, unrecognized by either statute or treaty, is a legal non-entity. In legal effect, to "recognize" rights is to "accord" or "grant" them.

As stated in *Tee-Hit-Ton Indians*, *supra*, at 289, 290:

> * * * Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

It is only the conquerors' will, manifested in a statute or treaty, which gives them any rights in land.

We discuss *Johnson v. M'Intosh* and its application in subsequent cases for three reasons. First, they place the notion of aboriginal tribal sovereignty

in proper perspective. It simply does not exist.[11] As shown by Justice Story, it was the denial of any such sovereignty which formed the basis for the whole development of the law in this field.

Secondly, the rule consistently applied by this Court when an Indian tribe claims one attribute of sovereignty, the right of land ownership is, we submit, also applicable when an Indian tribe, as here, claims another attribute of sovereignty, the right to impose its will on all inhabitants within a reservation. What is at stake in these cases is the right of Messrs. Oliphant and Belgarde, as residents on the Port Madison reservation, to be protected from a legal system in which, by reason of their race, they can have no voice. Surely that right is no less important, and no less deserving of protection from this Court than the right of the federal government to keep its treasury intact.

Thirdly, the approach taken in the Indian land cases parallels that described and followed in *McClanahan v. Arizona Tax Comm'n, supra.* It asks: Are the rights being claimed granted or recognized by treaty or statute? If such treaty or statutory language cannot be found, the "platonic notion" of tribal sovereignty will not provide a substitute; the rights being claimed must be denied.

[11]As shown by the dissents in *Tee-Hit-Ton, supra,* and *Northwestern Bands of Shoshone Indians, supra,* whether valid land claims exist in any given case is not always an easy question. But there is no disagreement over the proper starting point; congressional recognition must be shown to exist. Here, in contrast, there is a basic dispute as to the proper starting point, with each side realizing that if their starting point be accepted by this Court, the probability of their prevailing is increased tremendously. And in our view, the starting point here should be the same as in the Indian land cases.

Duwamish et al. Indians v. U.S., 79 C. Cls. 530 (1934), *cert. den.*, 295 U.S 755, provides an excellent example of the application of this approach to Indian tribes in the State of Washington. This case involved various types of claims, including claims by both treaty and non-treaty tribes for land supposedly taken from the tribes. The claims of the non-treaty tribes were denied, squarely on the basis of *Johnson v. M'Intosh*, 79 C. Cls. 530, at 598. And as stated by the court:

> While we may well suppose that the Government would not intentionally take from Indian tribes their claimed tribal lands without compensation, established precedents hold that the authority to do so exists *and until Congress grants lands to the Indians, either in treaties or acts of Congress* and afterwards takes them, a special act worded as in the instant case confers upon this court no jurisdiction to award a judgment as herein claimed. (Emphasis supplied) 79 C. Cls. 530 at 603.

The "chain of sovereignty" to the State of Washington merits a closer examination for two reasons. First, it shows that the sovereignty of the United States was derived from discovery, settlement, and treaties with other nations. It did not derive from the Indians.[12] Secondly, the Indians were to be treated, not as sovereign nations, but solely as groups whose persons and property should not be harmed.

[12]For an interesting discussion of U.S. sovereignty over what is now Washington by Jefferson's Secretary of the Treasury, see Gallatin, *The Oregon Question* (Bartlett and Welford, New York, 1846).

The United States claimed the area now embraced within the State of Washington by discovery and settlement and by the treaty extinguishment of conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), *Russia* (Convention of April 17, 1824, 8 Stat. 302), *and Great Britain* (Treaty of June 15, 1846, 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act "*shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory*, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *." *United States v. State of Washington*, 384 F.Supp. 312 at 353 (1974). (Emphasis supplied.)

All of these treaties and Acts[13] of Congress were adopted before any treaty-making took place with Indians in the State of Washington. The obvious policy embodied in these various acts was to protect the Indians, in their persons and property, during this interim period. Their right to occupancy was to be respected; but they were not in any way to be recognized as sovereigns.

2. *The Effect of Tribal Self-Government as a Shield Against the Application of State Law on Indian Reservations: "Exclusive Use" Language in a Treaty.*

The United States and the Tribe might contend

[13]We here refer to the act establishing the Washington Territory out of the Oregon Territory, mentioned later in the opinion.

that the very same treaty language which recognizes the right to ownership of specific land also constitutes recognition of sovereignty over that land as well. Article II of the Treaty of Point Elliott, for example, states:

> There is, however, reserved for the present use and occupation of said tribes and bands the following tracts of land, viz: * * *

Then follows a description of the lands reserved, in terms of sections and acres.

Any argument that such language constitutes a recognition of sovereignty presents at least three problems. First, while it is impossible to imagine a sovereign which does not have the right to own land, it is easy to imagine a landowner who is not a sovereign. Any private corporation will serve as an example.

The second problem is found in an interesting feature of the treaty itself. Even if the treaty be viewed as recognizing the Suquamish Tribe as a separate and distinct political entity, the treaty does not indicate what land that political entity is to own. For the treaty was negotiated with, and the lands were set aside for, twenty-two named tribes and bands, of which the Suquamish were only one. The treaty lumps all of the tribes and bands together, without in any way stating which portion of the lands reserved belongs to any specific tribe or band. The treaty does not even tell us which Indian group

owns what land, much less which group has "sovereignty" over such land.[14]

Thirdly, as *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) reminds us, even the right of tribal self-government—which is something quite different from "sovereignty"[15]—is grounded on treaty language different from that which grants the right to land ownership.

In *McClanahan*, the issue was whether the state of Arizona could impose its income tax on a Navajo Indian who lived on the Navajo reservation and there earned the income which the state was attempting to tax. This Court denied that power. And eschewing any "platonic notion" of inherent tribal sovereignty, it based its decision on specific treaty language. And the critical factor is that this language reserved land for the *exclusive* use of the Navajo Tribe.

> The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the govern-

[14]The record does not disclose how things finally became sorted out. Presumably it was by executive action. If so, then under the argument of the United States and the Tribe, criminal jurisdiction over Messers. Oliphant and Belgarde is really grounded on neither a treaty provision nor a statute, but on a discretionary executive order —surely a strange result.

[15]See brief of State of Washington as amicus curiae, pp 17-23.

> ment, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat 667, 668. 411 U.S. at 173, 174.

As noted by this Court, neither this language nor any other language in the treaty expressly stated that state tax laws could not cross the reservation boundary so as to reach the Navajos. But a fair reading of this language required such a result. 411 U.S. at 174, 175. And subsequent federal legislation recognized that this was the result of such language. 411 U.S. at 175. "Exclusive use" meant: "State law must stay out."

This same treaty language explains the result in *Williams v. Lee*, 358 U.S. 217 (1959). Here the person attempting to exert his authority under state law was not a state tax collector but a debt collector. The precise issue was whether state law and the state court system could be utilized to collect a debt owed by a reservation Indian to a non-Indian creditor, the debt arising from a transaction which took place on the reservation. Again, this Court held that state law could not penetrate the boundary of the Navajo reservation. Accordingly, the non-Indian creditor was left with whatever remedies he could find under Navajo law.

The treaty of Point Elliott contains language

paralleling that in the Navajo treaty. The second sentence of Article II states:

> * * * All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them. 12 Stat. 927.

Although this language may provide a shield, to keep state law from penetrating the reservation, does it provide a sword as well, which the Tribe may use to impose its law upon Messrs. Belgarde and Oliphant? We take up this question directly under the next heading. Here we make only two points. First, even the shield which this language provides has large holes in it.

In *Puyallup Tribe v. Washington State Game Department*, ... U.S. ....., 97 S.Ct. 2616 (1977), one of the issues was the right of the state to regulate Indian fishing on Puyallup River, which was within the exterior boundaries of the Puyallup reservation. This Court upheld that right.

> Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was "set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent." It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two acts of Congress, 27 Stat. 633 (1893), and 33 Stat. 565 (1904), the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their "exclusive use." * * * 97 S.Ct. 2622.

The subsequent history of the Port Madison reservation is similar to that of the Puyallup reservation. Over half of the land is no longer in Indian ownership. It was on such land that Mr. Belgarde's alleged offense took place. Moreover, even some of the land still retained under Indian ownership can hardly be viewed as reserved for exclusive Indian use; for the Indians have leased it out to non-Indians. It was on such land that Mr. Oliphant's alleged offense took place.

If, as *McClanahan* shows, tribal self-government is grounded upon the "exclusive use" language of the relevant treaty, then, as *Puyallup* shows, that language is not effective to establish such self-government on lands no longer under Indian ownership; state law reaches such lands. Indeed, we submit that it may reach certain lands in Indian ownership as well, if it be leased out to non-Indians.

And if such language cannot provide a shield

on such lands, how can it provide any sort of sword?

Secondly, *Williams v. Lee* does not show that this language provides an adequate basis for the jurisdiction being asserted here, as the Tribe and the U.S. seem to suggest. (Tribal Br. 49-51, U.S. Br. 15, 18) Again, this language deprived a non-Indian creditor of any right to use state law to collect a debt from a reservation Indian. As a result, the only collection tools left to him were those provided by Indian law.

It is one thing to leave a non-Indian who chooses to do business with Indians on a reservation in the position of having to rely solely on Indian law to collect business debts. It is quite another to make a non-Indian subject to general tribal criminal jurisdiction just because he happens to live on a reservation. The first result flows from the "exclusive use" language of the treaty, which sets up a barrier to state law. The second result does not flow from such language at all; it flows only from a "platonic notion," based upon a misreading and misapplication of *Worcester v. Georgia.* We examine that notion next.

3. *The Misapplication of Worcester v. Georgia by the Tribe and the United States.*

This is not the first case in recent years in which this Court has been called to examine exactly what Chief Justice Marshall held in one of his seminal opinions. *Cf., Michelin Tire Corp. v. Wages*, 423 US 276 (1976), overruling *Low v. Austin*, 80 U.S.

(13 Wall.) 29 (1871), and thereby correcting *Low's* misapplication of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

We start with the obvious: Mr. Samuel Worcester had been sentenced to a Georgia jail by a Georgia court and not to Cherokee jail by a Cherokee court. The issue directly involved was the validity of an assertion of criminal jurisdiction by the state of Georgia, not by the Cherokees.

However, the powers of the Cherokees were certainly a central issue. This becomes clear from Chief Justice Marshall's description of Mr. Worcester's plea entered in defense in the Georgia court.

The plea averred:

> * * * That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America. * * * 6 Pet. (31 U.S.) at 540.

In determining the validity of the plea, Chief Justice Marshall examined the provisions of two treaties, the treaty of Hopewell, 7 Stat. 18, (1785) and the treaty of Holston, 7 Stat. 39, (1791). On the basis of this examination, he concluded that these treaties did substantiate the plea.

Among the provisions of the treaty of Hopewell examined by the Chief Justice were three explicitly bearing on the question of criminal jurisdiction.

They are Articles V, VI, and VII; while the Chief Justice paraphrased them, we quote them:

ARTICLE V.

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please.

ARTICLE VI.

> If any Indian or Indians, or person residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation, or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States; Provided, that the punishment shall not be greater than if the robbery or murder, or other capital crime had been committed by a citizen on a citizen.

ARTICLE VII.

> If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States; and the punishment shall be in presence of some of the Cherokees, if any shall attend at the time and place, and that they may have an opportunity so to do, due notice of the time of such intended punishment shall be sent to some one of the tribes.

After describing these provisions, he states, with particular reference to the last two: "The only inference to be drawn from them is, that the United States considered the Cherokees as a nation." 6 Pet. at 553.

The analysis is inductive, not deductive. The specific powers of the Cherokees expressly granted or recognized in the treaties supported the general conclusion that the Cherokees were considered as a nation. *The conclusion was not reached first, and the specific powers then derived from that conclusion. There is no suggestion whatsoever in the opinion that these specific treaty provisions, upon which Justice Marshall relied to support his conclusion, were unnecessary and that the result would have been the same without them.*

We note also that under the treaty, the Cherokees did not have all the powers one would expect a sovereign nation to have. If a non-Indian settled on Cherokee land, Art. V provided that he was under the exclusive law of the Cherokees, presumably as either an offender or a victim. Otherwise, both in the case of an Indian committing a serious crime against a non-Indian (Art. VI) and in the reverse case of a non-Indian committing a serious crime against an

Indian (Art. VII), punishment was to be according to United States, not Cherokee, law.

Thus, the treaty of Hopewell did not even grant to the Cherokees a normal attribute of sovereignty, and one which the Tribe and the United States presumably would argue belongs to the Suquamish Tribe. This is the attribute which allows a sovereign nation to punish according to its own law, anyone and everyone who happens to be within its geographical jurisdiction, whether he has "settled" there or not.

The Chief Justice turned next to the treaty of Holston, and examined, among others, Article VIII, X and XI of the treaty. 6 Pet. at 556. See 7 Stat. 39 (1791).

These are essentially the same as Articles V, VI and VII of the treaty of Hopewell; and the Chief Justice reaches the same conclusion from them as he did from their counterparts.

> The remaining articles [including Articles X and XI] are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself. 6 Pet. at 556.

Again, the Cherokees had only those powers of "sovereignty" expressly provided for in the treaty—no less and certainly no more.

A provision similar to those in Article V of the treaty in Hopewell and Art. VIII of the treaty of Holston "* * * appears in almost all of the early treaties." (Tribal Br. 16.) These other early

treaties are listed by the Tribe at p. 16, note 19. Cf. p. 9, *supra*.

The reading of *Worcester* urged by the Tribe and the United States would automatically endow every Indian tribe with all the attributes of sovereignty unless an attribute is expressly denied by treaty. Yet, such a reading would make all these early treaty provisions redundant and totally unnecessary.

Moreover, as shown at page 9, *supra*, after 1796 these provisions were no longer included in treaties. The policy embodied in them was discarded. Yet according to the reading of *Worcester* urged by the Tribe and the United States, this policy must be resurrected: the tribes entering into these later treaties—such as the Suquamish—would possess the power conferred by these provisions in any event, unless expressly denied by another treaty provision.

Worcester, we submit, neither requires nor even suggests such absurdities. The approach taken by Chief Justice Marshall follows exactly that which was taken in *McClanahan* and which should be taken here. By focusing on powers conferred by specific treaty provisions, it avoids both platonic notions and historical distortions, while guaranteeing to the tribes those rights which the United States intended they should have.

4. *The Treaty Draft of 1854.*

The Tribe focuses on other absent treaty provisions, i.e., those included in Articles VIII and XII

of the 1854 treaty draft contained at Tribal Br. A-19. (Cf. Tribal Br. 42, 43). The elimination of the language in Art. VIII of the draft, stating that offenses by non-Indians against Indians would be punished only by the United States, shows, according to the Tribe, that the Treaty of Point Elliott was intended to allow Indians to punish non-Indians for such offenses.

But how does the Tribe explain the elimination of Article XII of the draft, which stated that the Indians were to punish Indians for offenses against Indian law? Did the elimination of this language from the Treaty of Point Elliott deprive the Tribe of this power and leave it only with the United States? The Tribe's reasoning requires this result.

Moreover, if the Tribe is suggesting that these provisions were somehow "negotiated out", such a suggestion is incorrect, as is shown by the same microfilmed materials relating to the history of the Point Elliott Treaty as are cited at Tribal Br. 42, note 60.

The elimination of both sets of provisions is easily explained. Commissioner Gibbs was a lawyer. (Tribal Br. 42) He presumably knew of the existence of what is now 18 U.S.C. 1152, pursuant to which federal law applied unless both wrongdoer and victim were Indians, in which case Indian law applied. Therefore both sets of provisions were redundant.

B. To Make a non-Indian Subject to the Suquamish Tribal Code, when that non-Indian is Completely Disenfranchised by the Suquamish Tribe, Constitutes a Violation of the Fifth and Fifteenth Amendments of the U.S. Constitution and the Similar Guarantees Contained in the Indian Civil Rights Act.

We address here, the most distressing aspect of this whole case. The United States touches on this aspect only slightly (U.S. Br. 45) and the Tribe not at all.[16] Yet it is undoubtedly the reason for the attempts of both to make the Tribe's jurisdictional claims appear less broad than they really are.

The Fifteenth Amendment provides, in section 1:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

If the State of Washington were to attempt to deny members of the Suquamish tribe the right to vote in state and local elections, there can be no doubt that the attempt would be declared a violation of the Fifteenth Amendment. And this would be so

[16]The United States hints at the problem:

> On the other hand, it is arguable that white residents of Indian reservations, some of whose ancestors settled long ago at the invitation of the federal government, under the assumption that they would not be subjected to tribal law, have a strong claim. That concern has been importantly reduced by the Indian Civil Rights Act, 25 U.S.C. 1301, 1302, 1311. Nevertheless, at the end of the day, it may be that the Tribes will have to choose between narrowing the territorial jurisdiction of their laws and courts or admitting non-Indian residents to participation, at least on juries. But, as the court of appeals stated, that is a matter that need not be resolved at this stage of the litigation. U.S. Br. 45, 46.

We submit that the Tribe is constitutionally required to choose—now. The matter of subjecting white residents to laws in the making of which they cannot participate must also be resolved—now. And it cannot be resolved by just putting non-Indians on juries.

even if the grounds of the denial were that the tribal members belonged to a separate and distinct political entity, the Suquamish Tribe. For they are citizens of the United States and any argument based on membership in a "distinct political entity" would be tossed aside as a patent subterfuge. The true basis of the denial of the franchise would be quickly seen—race.

The Suquamish Tribe wishes to extend its criminal code to non-Indians, yet deny them the franchise. And the reason for the denial is the same as in the converse situation—race.[17]

We are not here suggesting that the Fifteenth amendment applies to the Suquamish Tribe as such. But certainly it applies to the United States. After all, it is a purported *federal* policy—"contemporary federal Indian policy" to use the phrase of the Tribe (Tr. Br. 61)—that forms the subject matter of this case.

The whole argument of the United States and the Tribe is that under this purported federal policy, the Tribe may apply its criminal code to non-Indians, while denying them the right to vote. That is a policy which, we submit, the Fifteenth amendment prohibits the federal government from adopting.

[17]The racial basis of the denial of the franchise becomes clear upon an examination of the tribal constitution; to belong to the Tribe, one must have "Suquamish Indian blood." Art. II, Pet. App 5(a). Admittedly, other Indians are denied membership as well. But that is certainly irrelevant. If a state law denies the franchise to everyone except whites who can trace their ancestry back to a person who resided in this country prior to July 4, 1776, it would hardly be a proper defense of such a law, if attacked by blacks on Fifteenth amendment grounds, that most whites were disenfranchised too.

It is no answer to say that the policy choice is made by someone else, such as the Tribe, and not by the federal government. States have tried similar arguments in their attempts to justify racial discrimination. This Court has consistently rejected them. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Terry v. Adams*, 345 U.S. 461 (1953).

Further, even if the basis of the denial of the franchise to non-Indians be viewed as something other than racial in nature, this simply changes the grounds of the constitutional violation, from the Fifteenth amendment to the Fifth amendment.[18] It does not eliminate the violation itself.

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated, as violative of the equal protection provisions of the Fourteenth amendment, a Louisiana law which gave only property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility.

The city offered the argument that property taxpayers have a "special pecuniary interest," in that the efficient operation of the utility system affects property values and the investment of property owners. This Court rejected the argument, noting the obvious fact that the efficient operation of the utility system affects all residents, be they property owners or not, and then stating:

[18]The equal protection requirements of the Fourteenth amendment apply to the federal government by virtue of the Fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

> The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a "special interest," the statute clearly does not meet the "exacting standard of precision we require of statutes which selectively distribute the franchise." Kramer v Union Free School District No. 15, supra, at 632, 23 L Ed 2d at 592. 395 U.S. at 706.

According to the Tribe and the United States, the tribal criminal code is to apply to Indians and non-Indians alike. The non-Indians would thus be as substantially affected and directly interested as Indians in the election of those who adopt that Code. The Indians might indeed have some sort of "special interest" in that Code, though we find it hard to imagine what it might be. In any event, it should be treated the same as the "special interest" offered by the City of Houma.

If we shift our focus from the level of the federal government to that of the Tribe itself, the problem still remains. 25 U.S.C. 1302(8) provides in pertinent part as follows:

> "No Indian tribe in exercising powers of self-government shall:
> "* * *
> "(8) deny to any person within its jurisdiction

> the equal protection of its laws or deprive any person of liberty or property without due process of law."

This statute is part of the 1968 Indian Civil Rights Act, 82 Stat. 77. It makes applicable to a tribe the same fundamental requirements of the Fourteenth amendment as are applicable to any state or subdivision of a state. And if a tribe attempts to bring within its criminal jurisdiction all non-Indian residents, as well as Indian residents, those fundamental requirements of equal protection demand that the non-Indians be given the right to vote. *Cf. Cipriano, supra, Dunn v. Blumstein,* 405 U.S. 330 (1972). See generally Karst, Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977).

It might be countered that one cannot challenge the validity of a law on the grounds that the person to whom the law applies has been excluded from the law-making process. The usual procedure would be to have the courts remove the exclusion and vindicate the right to vote, leaving the challenged law intact. We agree.

It may also be urged that giving non-Indians the franchise would destroy the Indians' power of self-government because they are so small a minority on their own reservation. Again we agree.

How, then, can the constitutional—and statutory—rights of the non-Indians be preserved, while preserving tribal self-government at the same time.

There is only one way to reach this goal. The scope of tribal self-government must be confined—to true self-government—strictly to members of the tribe. To expand it, as the United States and the Tribe wish to expand it here, is necessarily to destroy it, on the anvil of the constitution and the Indian Civil Rights Act.[19]

The Tribe, and perhaps even the United States, would argue that this expanded notion of tribal self-government is precisely what is guaranteed by the treaty of Point Elliott. If that be the effect of the treaty, then that portion of the treaty containing such a guarantee must fall. (We assume, *arguendo*, that treaty language containing such a guarantee can be found in the first place.) Congress may not, under the treaty-making power, deprive citizens of their constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1954).

Problems similar to those we have discussed appear, although in less aggravated form, when one considers the problem of procedural due process. By tribal resolution dated June 12, 1977, the right to serve on a tribal jury was reserved to tribal members only. (Pet. App. 65a) But those tribal members do not have to be residents of the reservation. *Ibid.*

[19] *U.S. v. Mazurie*, 419 U.S. 544 (1975) provides no escape from the dilemma. If federal law prohibited the sale of alcoholic beverages in Indian country, certainly no constitutional problem would be presented. And making such a prohibition dependent, in whole or in part, on the concurrence of those for whose benefit the prohibition is intended, the Indians, presents no such problem either. That was, in essence, the situation in *Mazurie*. And that is a fundamentally different situation from that presented here, in which the Tribe asserts general criminal jurisdiction over everyone within the reservation.

Thus, Messrs. Oliphant and Belgarde face the prospect of facing a jury which will certainly contain no fellow non-Indians, and might even contain no fellow reservation residents either. This hardly measures up to the constitutional standard of a jury of one's peers. *Cf., Reid v. Covert, supra.*

Admittedly, if Messrs. Oliphant and Belgarde are tried by the Tribe, the Tribe may by then have amended its ordinance to remedy this glaring defect; and if it has not, the issue can be raised through normal post-conviction procedures. In this sense, the issue may be technically premature, as suggested by the majority in the court below.

But the issue is still relevant. The Tribe undoubtedly views its resolution governing jury selection as but another exercise of its right of tribal self-government. Any change in the selection procedures would be, under this view, a diminution of such a right. And the Tribe's point would be well taken.

But this shows once again the underlying dilemma. The Tribe's claims to an expanded notion of "sovereignty"—to use the term the Tribe undoubtedly prefers—simply cannot be reconciled with the fundamental constitutional rights, both substantive and procedural, of those non-Indians to whom this expanded notion applies. The right of Tribal self-government, including the right to have only Indians on a jury, can only be preserved by confining the substantive scope of that right strictly to members

of the tribe. To expand it to fit the Tribe's notion of "sovereignty" is to destroy it.

The substantive dilemma, if unresolved, immediately leads to a similar dilemma on the procedural level. The way out of both dilemmas is to restrict the scope of the Tribe's criminal jurisdiction.

C. Neither the General Allotment Act, nor the Indian Reorganization Act nor the Tribal Constitution Adopted thereunder Recognize the Tribal Criminal Jurisdiction over non-Indians.

If the federal policy in effect at the time of signing of the Treaty of Point Elliott had remained in effect, the problem now before this Court would probably have not even arisen. For the essence of that policy was this: Indians would stay on the reservation, and non-Indians would stay off. Each would leave the other alone, and for the most part "never the twain should meet."

But federal policy changed—drastically. In a series of allotment acts, the most important of which is the General Allotment Act of 1887, 24 Stat. 388, the reservations were broken up into allotments for individual tribal members, which were then frequently sold to non-Indians. It is this switch in federal policy which brought the non-Indians onto the Washington reservations en masse, including the Port Madison reservation.

This change in land policy was but part of a larger change. The new federal policy was nothing

less than the complete integration of Indians into non-Indian society. And as part of that integration, they were to become subject to state law.

As stated in section 6 of the General Allotment Act:

> "Each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

A non-Indian settling on the Port Madison Reservation, pursuant to this new federal policy, was thus told by the federal government that his Indian neighbor would become subject to state law, and not that he would become subject to the law of his Indian neighbor.

The Indian Reorganization Act halted the break-up of the reservations, by stopping the allotment process.[20] But this Act gave no hint to the non-Indian neighbor that he was to become subject to Indian law.

Section 16 of the that Act, 25 USC 476, did empower the tribes to adopt a constitution. But not even that section suggests that the tribal constitution could extend tribal law to non-Indians.[21]

Pursuant to 25 USC 476, the Suquamish Tribe did in fact adopt a constitution. But that document as well would give no hint to the non-Indian neighbor

[20]Because the process of making Indians subject to state law was dependent on the continuation of the allotment process, the Act stopped the operation of section 6 of the General Allotment Act as well.

[21]25 USC 476 is quoted in full at Pet. App. 16a.

that he was to be subject to Indian law. It would tell him just the opposite. For the powers conferred under the constitution were expressly confined to tribal members. (Pet. App. 4a-6a.)

In the mid-fifties, federal policy switched again. Integration of Indians into non-Indian society, and subjection of Indians to the same law as their non-Indian neighbors, again became the goal, as evidenced by P.L. 83-280. As before, there was no warning that the non-Indian neighbor would become subject to Indian law. Just as in the late 1900's, the policy was just the reverse—to make the Indian subject to state law.

The Congress has vacillated back and forth on the issue of whether the Indian should become subject to general state law. But there has been no similar vacillation on the issue of whether the non-Indian should become subject to general Indian law. In all of these twistings and turnings of federal Indian policy, there has at least been this one constant.

D. **Absent a Vesting of Criminal Jurisdiction in the State, Federal Criminal Jurisdiction under 18 USC 1152 is Exclusive over non-Indian Offenders on the Port Madison Reservation.**

1. *The Primary Submission of the United States.*

The United States contends (U.S. Br. 26-38) that the Treaty of Point Elliott has reserved to the Suquamish Tribe criminal jurisdiction over all non-

Indian offenders. More importantly, that tribal jurisdiction is *exclusive*, with the result that the "treaty exception" in § 1152 applies. This treaty exception removes from the scope of § 1152:

> "any case where, *by treaty stipulations*, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." (Emphasis supplied)

But the United States can point to no specific language in the treaty expressly conferring such exclusive jurisdiction. And the phrase "treaty stipulations" would certainly suggest that such express language must be found.

Such express treaty stipulations were, as we have seen at pp. 9, 30, *supra*, often included in the early treaties. No stipulation even remotely similar was included in the Treaty of Point Elliott.

What the drafters of the treaty exception had in mind is shown in a decision of this Court which is the first—to our knowledge—to involve an application of that exception. *Ex parte Mayfield*, 141 U.S. 107 (1891).

At issue in *Mayfield* was the applicability of Article XIII of an 1866 treaty with the Cherokees, which read as follows:

> "The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive

> jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." 141 U.S. at 113.

Mayfield was convicted in federal court of the crime of committing adultery with a non-Indian. This Court held that since he was a citizen of the Cherokee nation, albeit adopted, and since he was the only party, he was within the scope of Article XIII. Accordingly, the treaty exception applied, and his conviction in federal court was overturned.

Apparently, in the view of the United States, the result would have been the same even if Article XIII had been absent from the treaty; it would be *implied*, just as with the Treaty of Point Elliott.

More significantly, the United States surely proves too much. It admits (U.S. Br. 35) that before 1968, the Suquamish Tribe had no police system or court system. Yet prior to that time, according to the United States, the Tribe had *exclusive* criminal jurisdiction over *all* crimes by non-Indians on the reservation.[22]

We have thus a strange result. The only governmental body with criminal jurisdiction over non-Indians had no police or court system. The two bodies which were enforcing the law on the reservation,

[22]Such was not the case, of course, with Indians, by reason of 18 USC 1153, the Major Crimes Act. But that Act applies *only* to Indians.

the federal government and the state, had no criminal jurisdiction whatsoever over non-Indians.

Moreover, this situation was presumably not confined to the Port Madison reservation. All of the treaties negotiated by Governor Stevens, and therefore all of the treaty reservations in Washington State would present an identical situation, because of identity of language.[23]

We are certain there are many non-Indians confined in either state or federal prisons for crimes they committed on Washington reservations, who would find the argument of the United States most interesting. If valid, it is their ticket to freedom.

Nor does the Indian Civil Rights Act of 1968 eliminate the problem with respect to crimes committed by non-Indians after its passage. That Act limits only the *sentencing power* of a tribe. 25 U.S.C. 1302(7). Contrary to the suggestion of the United States (U.S. Br. 36), it does not limit the scope of the asserted tribal *jurisdiction* to minor crimes.[24] The ticket to freedom is still current.

2. *The Alternative Submission of the United States.*

While the Tribe does not join in this first argu-

[23]Treaty of December 26, 1854, with the Nisqualli, Puyallup, etc., 10 Stat., 1132; Treaty of January 22, 1855, with the Dwamish, Suquamish, e[illegible] 12 Stat., 927; Treaty of January 26, 1855, with the S'Klallam, [illegible] Stat. 933; Treaty of January 31, 1855, with the Makah, 12 Stat. 939; Treaty of June 9, 1855, with the Yakima, 12 Stat. 951; Treaty of June 9, 1855, with the Walla Walla, Cayuse, etc., 12 Stat. 945; Treaty of June 11, 1855, with the Nez Perces, 12 Stat. 957; Treaty of July 1, 1855, with the Quinaielt, etc., 12 Stat. 971.

[24]The Tribe itself apparently shares our view. For the Law and Order Code includes a number of major crimes over which the Tribe maintains that it has concurrent jurisdiction. See p. 2, *supra*.

ment of the United States, it does join in the second viz., that any federal jurisdiction conferred under § 1152 is only concurrent with tribal jurisdiction. (U.S. Br. 38-41, Tribal Br. 28)

The major embarrassment here for the Tribe and the United States is the double jeopardy exception. This exception does show that federal and tribal jurisdiction would be concurrent in certain cases—but only where Indians were involved. Congress failed to apply the exception to non-Indians.

The United States attributes this failure to congressional oversight or neglect. (U.S. Br. 40). We find it difficult to assume that the Congress was so sensitive to the legal rights of the Indians and so insensitive to those of non-Indians. It is more reasonable to assume that Congress believed Indian Tribes to have no criminal jurisdiction over non-Indians at all. For in this belief, Congress would have been following the advice of the U. S. Attorney General on the subject, 2 Op. Atty. Gen. 693 (1834). Moreover, as shown by an examination of the treaty provisions discussed in that opinion[25] and 7 Op. Atty. Gen. 174 (1855), [26] Congress would have been following the pattern embodied in the then current treaties as well.

If federal jurisdiction over non-Indians is not exclusive of tribal jurisdiction, then the absence of a double jeopardy exception for non-Indians is still a current problem. At least, this will be so if this

[25]Treaty of September 27, 1830, with the Choctaws, 7 Stat. 333.
[26]Treaty of July 1, 1834, with the Chickasaw, 7 Stat. 450.

Court reverses the holding of the Ninth Circuit and sustains the position of the United States in *U.S. v. Wheeler*, No. 76-1629. The issue in that case is whether there is a constitutional bar to successive trials for the same offense in tribal and federal courts. If there is no such bar, Messrs. Oliphant and Belgarde, for example, could be tried for their alleged offenses both by a Tribal court and by a federal court as well, under 18 U.S.C. 1152 and 18 U.S.C. 13, the Assimilative Crimes Act. But an Indian could not be tried by federal court for similar offenses, if found guilty and punished by the Tribal court first. And this is by reason of the fact that the double jeopardy exception applies only to Indians.

If the United States is correct in its position here, that jurisdiction under § 1152 over non-Indians is concurrent with that of the Tribe, and if it is also correct in its position in *Wheeler*, a serious constitutional question is inevitably raised.

Finally, the view that federal jurisdiction over non-Indians under § 1152 is exclusive, rather than concurrent with the tribe, is precisely the view taken by this Court in *Ex Parte Mayfield*, 141 U.S. 107 (1891), discussed at p. 43, *supra*.

The United States does not discuss this important decision, and the Tribe completely misreads it. It deserves a more careful examination.

As previously noted, the precise issue was whether Article XIII[27] of the 1866 treaty with the Chero-

[27]Quoted *supra*, pp. 43, 44.

kees triggered the treaty exception in § 1152.[28] The Court held that it did.

The United States contended that Article XIII was not effective—and the treaty exception was thus inapplicable—because a federal court of general jurisdiction had not been established in the Indian territory, as contemplated by Article XIII.

In disposing of this argument, the Court reserved its opinion as to whether any such court was required at all in order to make the Article effective. It then stated that the Act of March 1, 1889 (25 Stat. 783) established such a court in any event. The Court next noted the existence of another act, *passed after the commission of the offense*, though before the indictment, which recognized the jurisdiction of native courts, and thus confirmed the effectiveness of Article XIII. This latter Act was that of May 2, 1890 (26 Stat. 81).

The function of the 1889 Act and the 1890 Act was solely to confirm the effectiveness of Article XIII. As we have noted, the Court expressed its doubts that such statutory confirmation was even necessary.

The Court went on:

> The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civiliza-

[28]Then codified as Rev. Stat. 2145, which contained the basic statute, and 2146, which contained the exceptions.

> tion. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith. The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 141 U.S. at 115, 116.

The "policy of Congress" is that embodied in §§ 2145, 2146 and Article XIII of the treaty. And the "Statutes" referred to must be §§ 2145 and 2146 Rev. Stat., and not, as the Tribe argues (Tribal Br. 38), just the 1889 and 1890 statutes. For the only statutes that were legally operative, in conjunction with the treaty, were §§ 2145 and 2146. Admittedly, the reference may include the 1890 statute, along with §§ 2145 and 2146. But that statute essentially just confirmed the effect of the treaty itself; that was its only relevance.

Lastly, note the use of the word "reserve". Actions falling within the scope of § 2145 are *reserved* to the courts of the United States. Under the system envisioned in § 2145, there is no room for concurrent jurisdiction with Indians over non-Indians.

E. The Issue of P. L. 83-280.

Thus far, we have argued only that the Tribe does not have criminal jurisdiction of the type asserted here. We have not addressed the question of where that jurisdiction actually lies, *i.e.*, in the State

of Washington or in the United States. Under our arguments, that question does not have to be addressed.

As correctly pointed out by the United States (U.S. Br. 50), that question is, however, presented in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443, remanded 552 F.2d 1332, rehearing denied, No. 74-1225, July 1, 1977. As further pointed out by the United States (U.S. Br. 51), assumption of jurisdiction by a state under Public Law 280, 67 Stat. 588 (1953) may well oust any federal *and tribal jurisdiction*. We would argue that such an ouster is the precise effect of Public Law 280, for the very reason suggested by the United States (U.S. Br. 51).

We prefer to argue all issues relating to Public Law 280 in the context of the *Yakima* case, not this one. And under our arguments in this case, they would not be reached. However, should this Court find in this case, contrary to our arguments, that the Tribe has jurisdiction, the Public Law 280 issues must then be considered.

If those issues be reached in this case, it may aid the Court in its consideration of them to have the benefit of full briefing and oral argument in *Yakima*. In this event, we would join the Washington State Attorney General in urging that probable jurisdiction in Yakima be noted, in order that the common issues in both cases may be considered together.

We would point out, however, that there are

certain Public Law 280 issues which are not common to this case and *Yakima*.

The basic issue in this case is the effect of Public Law 280 on non-Indians: does it apply at all to them? And if so, does it oust any tribal jurisdiction over them? The basic issue in *Yakima* is the applicability of Public Law 280 to Indians: did the State's partial assumption of jurisdiction over the Yakima reservation deny the Yakima Indians equal protection?

Further, the State's assumption of jurisdiction over the Port Madison reservation may not be just a partial assumption, as in *Yakima*. This issue turns on the effect of the attempted retrocession of jurisdiction in 1971 by Governor Evans. See Pet. 119-123. If that retrocession be void, the equal protection problem presented in *Yakima* is not presented here.

CONCLUSION

For the reasons given above, the judgments of the courts below should be reversed.

Respectfully submitted,

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APPENDIX A

Ex. USA 20, p. 28, in U.S. v. Washington, 384 F. Supp. 312 (1974).

D. **Signing the Treaties**

Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs". The basis for choice were friendliness to Americans, real or apparent status in their communites, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the U.S. to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes", each of which had been assigned a "head chief". The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

APPENDIX B

Ex USA 27a, pp 14-29 in U.S. v. Washington, 384 F. Supp. 312 (1974).

In 1854 the nature of native Coast Salish political organization in the Puget Sound area was not well understood by non-Indians. There appeared to be a bewildering number of politically autonomous village units composed of one or more multi-family dwellings. A village group might consist of a few dozen or over a hundred people. The villages were only occupied by the entire village group during the winter season. At other times of the year, portions of the population de-camped in different directions to secure food and other supplies. The village group did not move as a unit; rather family groups dispersed possibly to camp temporarily with family groups belonging to other winter villages. The particular combinations of co-resident families at these seasonal camps and fishing locations were not necessarily the same from year to year. The variations in size of winter villages and composition of seasonal camps made it impossible for outsiders to identify political units with any certainty.

Leaders were equally difficult to identify. They clearly existed, yet there were no village chiefs nor was any man chief over more than one village. Suttles (1963:513) describes the situation in the following manner:

> It appears that at the time of white settlement the whole area formed a social continuum within which the village was only one of several

equally important social groupings. On the basis of winter residence, we might distinguish four levels of discrete units: families, each occupying its own section of a cedar-plank house and maintaining its own domestic economy; house groups, each composed of several families (related through either males or females) occupying a plank house and co-operating as hosts of feasts and other ceremonies; villages, each composed of a group of such houses occupying a short stretch of beach or river bank and sharing a common name and identification with territory; tribes, generally composed of several villages occupying a longer stretch of shoreline or a drainage area and sharing a common name and, to some extent, forms of speech, subsistence methods, and ceremonial procedures. On the basis of kinship, however, we can distinguish at least one other kind of group: a nondiscrete, nonlocalized, property-holding kin group. It was this group or its head, rather than any of the residential groups, that owned the most important ceremonial rights and the most productive natural resources. Finally, on the basis of participation in the yearly round of subsistence activities and periodic ceremonial activities, we might distinguish a number of other social groupings, none of them necessarily identical with the residential units or the kin groups, some of them necessarily differing from them.

Within this whole, the village was certainly not a self-contained social unit. Individual and family ties were as strong between villages as within the village. Individual and family status was as dependent upon ties of marriage and kin-

ship with other villages as upon economic rights and traditional identity with one's own village. Within the village, people might co-operate in food-getting, exchange labor, and join in potlatching and mutual defense, but they were not obliged to do so by any formal village organization. There was no office of village chief and no village council. Co-operation was *ad hoc*. Leadership was for specific purposes and was exercised by virtue of specific skills, property rights, or supposed superhuman powers (see Barnett 1955:243; Duff 1952:81-82). Moreover, recognition of leadership came as much from outside the village as from within. Conflict within the village was often resolved by one party's leaving it.

Law and order were maintained in native Coast Salish society through a variety of social pressures, but these did not include exercise of authority by a "chief", "council", or policing group such as occurred among various Indian groups elsewhere. When friction occurred between individual Puget Sound Indians and white settlers, there was no head man in the Indian community who had authority, for example, to turn over offenders to the non-Indian authorities or who could dictate rules of behavior to other Indians vis-a-vis the whites.

Gibbs (Defendant's Exhibit 52, State v Moses, et al.) sent a report dated Olympia, February 7, 1854, concerning the murder of Captain Jewell by Clallam Indians to Governor Stevens. At page 4 he advised Stevens of the limited authority of chiefs

(called "tyees" in Chinook jargon) and recommended that the government take steps to alter the existing state of affairs.

> The usual course has I believe been where a criminal could not at once be taken, to seize the chief to whose band he belonged and retain him as a hostage for the delivery of the actual offender, and such I believe to be good policy. Mr. Wilson whose knowledge of these Indians is unquestionable, states indeed that the influence even of the principal chiefs is very limited. But if they do not possess the power of punishing, they certainly have through their immediate followers, as well as through their wealth a certain control, and it is desirable to compel them to exercise it. The wisest course for the government to pursue seems to be to aggrandize a few principal chiefs at the expense of the petty tyees; to recognize the former alone and to hold them responsible for all acts committed by their people. They will thus be compelled to exercise an authority which they did not before possess.

In a separate report prepared in January or February, 1854, Gibbs (1855:424) pointed out the difficulties in trying to control an indigenous population without strong chiefs and centralized authority. His earlier suggestion to aggrandize chiefs is repeated and to it he adds the recommendation to amalgamate small bands under a single head.

> One principle of policy, in particular, should be observed—the union of small bands under a single head. The maxim of divide and conquer does not apply among these people. They are

> never so disposed to mischief as when scattered and beyond control; whereas it is always in the power of the government to secure the influence of the chiefs, and through them to manage their people. Those who at present bear the name have not influence enough, and no proper opportunity should be spared of encouraging and supporting them in its extension.

Stevens evidently took up the suggestion, because the following month he proceeded on an expedition to arrest the murderers of a Mr. Young and took the occasion to appoint a number of chiefs and subchiefs. Evidently Gibbs accompanied the Governor and kept notes of the proceedings (Defendant's Exhibit 53, State v. Moses, et al.). This record is of crucial interest because it sets out plainly the manner and circumstances in which three of the four head chiefs and a number of sub-chiefs who later signed the Treaty of Point Elliott were selected.

> **March 10th.** Started for Seattle accompanied by the troops. Col. Wallace also went as a volunteer. Reached Seattle toward evening and met Mr. Tobin and other citizens who commenced preparations for an expedition against the Indians. Dr. Maynard had represented that the wish of the Citizens was that no troops should be employed, but no such sentiment had been expressed, or as far as we could learn existed.
>
> **March 11th.** The Indians were called together for a talk. There were present Patkanam with part of the Snoqualmoos and Seattle with those of the Dwamish in town, also George Seattle his son who is in effect chief of the Suquamish his fa-

ther's tribe proper. The Citizens likewise attended. Mr. Collins of the Dwamish river acted as interpreter, into Chinook and an Indian translated as he went on.

Gov. Stevens explained who he was, and why he was there. Several murders had recently been committed and should be punished. He would not punish the innocent for the guilty, but he should consider all as guilty who should assist or conceal the murderers. They were to understand that the whites would combine to punish all the Indians who were guilty of these crimes. The whites were as many as the trees and could kill them all. If the whites wronged the Indians, they were to come to him and he would set them right; they were not to revenge themselves. He would hold Patkanam and Seattle responsible for the good behavior of their respective people, and would appoint sub-chiefs to support them in their authority. The other Indians should remain at the place and keep quiet till his return. The Governor added that he had many Indians to attend to besides them & he had therefore appointed Col. Simmons agent or Chief over them to act in his place.

Patkanam said in reply that he was grieved on account of his own people, two of whom had been hung. That he was now afraid of the whites and should behave well. He and Seattle gave as the names of Cherry's murderers (?Young's)

Sleh-ho-haat }
Slach-ka-nam } Snohomish Indians

(*Note.* The persons alluded to by Patkanam were the ones hung at Stilacoom for the murder of an American named Wallace at Fort Nis-

qually, as detailed in Gen. Lane's report 1850.)

The following were then selected jointly by Col. Simmons & Patkanam as Snoqualmoo sub-chiefs.

Patkanam Head Chief
Squush-um
Klmsh-Ki-lum
S't-how-ah
Ne-queh-wis-atl
Tah-te-tum or John Kanam
St-meh-luch
Tah-ta-qualth
Sim-ka-meh-us
Te-uch-ke-lun-hoo
Sweh-le-quatl
Ye-tak-kwoo
Squul-la-kum

Governor Stevens ordered all to remain except those whom he should select to accompany him. The following were then recognized as Chief and Sub-chiefs of the Dwamish, Suquamish, and other tribes connected with them.

Seattle, head Chief
Schwoo-yehm or George Seattle
Sgoo-dahtl or Jake
Nah-wa-chais
Wil-lak or Jack
Sem-a-hahts-oot or Jack
S'he-doke-stan or Jim
Sma-keh-let-hoo
Sah-look-taw or Charley
S'hoo-dahch-tan
We-hehl-choo or John
Klow-is-sa
Steh-hum

Klim-shult-hoo
Se-guk-a-kwus
Kah-ka-hus
Kwah-ke-koo or Tom
Kwul-at-sut-hoot
Sul-a-whe h-oos
Also See-ah-num-kan
Yup-a-nee-chin
The two latter being particular followers of George Seattle, Suquamish, and
Nuk-shehm or John
Sto-daht or Bill
Dwamish Indians, strikers of old Seattle.
* * * *

March 17th. Part only of the Skagits attended. George's courage failed him and he ran off. Governor S. addressed the Skagits to the same effect as the other tribes and informed them that they must have chiefs who should be responsible if any thing was wrong. They should choose a head chief and he would appoint 15 good men to support him. They must obey the chief and the others stand by him. Mr. King, a citizen, acted as interpreter. The Indians seeming unwilling to make a choice, Gov. S. appointed
Goliah head Chief
and Kwal-lat-ta or Gen Pierce
Geo. Sneetlum
Squai-a-qui
Schee-ap-kee
Ha-lo-mits
Tenass George Sub-Chiefs

This document is revealing in that it clearly shows that the designation of chiefs and sub-chiefs

had little or nothing to do with indigenous political authority, but was dictated by the exigencies of the moment. The 'recognition' of Duwamish chiefs and sub-chiefs, of particular interest to us, apparently depended on which Duwamish happened to be in town. Gibbs notes that Stevens had to appoint the Skagit head chief and sub-chiefs because the Indians seemed unwilling to make a choice. The same circumstance was later met with the Makah.

Apart from Seattle, who signed the Treaty of Point Elliott as head chief of the Suquamish and Dwamish, only three sub-chiefs are identified on that document as Dwamish. One of them is Now-a-chais, clearly the Nah-wa-chais whose name is listed in second place on the roster of Suquamish and Dwamish sub-chiefs in the above journal record. The other two signatories identified on the treaty as Dwamish do not seem to be represented on this list.

After returning from the above expedition, Stevens (Defendant's Exhibit 54, State v. Moses, et al.), issued written instructions to Col. M. T. Simmons as Special Indian Agent for Puget Sound District relative to preparations for treaty negotiations.

> You are expected to enter forthwith upon a tour through the various tribes embraced within your District. For the purpose of acquainting yourself thoroughly with their condition, instructing them as to their relations with the citizens, and preparing the way for future negotia-

tions. For this purpose you will organize small bands, not at present united, by gathering them into tribes, having reference to their general affinities, and by procuring the selection of head Chiefs and of assistant or lesser tyees, over the larger existing tribes you will also direct the appointment of head and Sub-Chiefs, taking care that in every case they be persons who, in your opinion will control them to best advantage. To these respectively you will issue commissions of the forms enclosed, filling up the blanks & making a record of the persons to whom they are given. In commissioning those persons, whom you shall determine to recognize as chiefs or petty tyees, you will explain to them that hereafter they will be held responsible in the first place for all offenses committed against citizens by Indians of their tribe, that the head Chief will in such cases be called upon for delivery of offenders, and the smaller chiefs looked to for his support, but that should they be unable without assistance from the government to make arrests, such aid will be given at their request. You will likewise inform them that on failure to do their duty, they will be removed and others appointed in their place, and that in every case of resistance by a tribe to the authorities, it will be dispersed by force and not considered in any future treaties or in payments for lands.

Stevens received his official instructions to negotiate treaties with all Indians of Washington Territory in a letter dated August 30, 1854, from Charles E. Mix, Acting Commissioner of Indian Affairs.

These instructions give official sanction to the policy which Stevens had already initiated of creating fictitious tribes by appointing head men. The government clearly wished to avoid having to treat with 'each of the forty or fifty separate bands'.

> Sir: * * * In concluding articles of agreement and convention with the Indian tribes in Washington Territory, you will endeavor to unite the numerous bands and fragments of tribes into tribes and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.
>
> The formation of distinct relations with each of the forty or fifty separate bands of Indians in Washington Territory would not be as likely to promote the best interests of the white settlers or of the Indians as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations, in a limited number of districts of country, apart from the settlement of the whites.
>
> Unless some arrangement can probably be effected you will at present conclude treaties with such tribes or bands only as are located immediately adjacent to the settlements of the whites, and between whom and our citizens animosities prevail, or disturbances of the peace are reasonably apprehended, and in entering upon the execution of the duty, with which you are hereby charged, you will turn your attention first to such tribes and bands.
>
> It is desirable also that the stipulations to be fulfilled annually on the part of the United

States be few in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard particularly, if you are unable to effect the combination of all the bands into six or eight tribes, or to arrange half a dozen treaties, or less, so that every one of the tribes shall be a party to them.

Stevens was faced with what appeared to be a large number of politically autonomous groups whose leaders seemingly had little authority to direct the behavior of others or to command a large following. He had official approval to create larger political entities, and by implication at least, to appoint head chiefs over these since the object was to have as few treaties and reservations as possible and to have 'distinct relations' with a smaller number of tribes. At the same time he was directed to include all the Indians in the treaties.

Once these problems and policies are understood, the plan for the Treaty of Point Elliott becomes clear. The treaty area extends from what is now the Canadian border, bounded on the east by the crest of the Cascade Mountains and on the west by the divide between the White and Puyallup rivers. It included several thousand people living along the bays and islands in the Sound and Straits and along the rivers which drain into the eastern half of Puget Sound. It included speakers of Straits Salish in the north,

Puget Sound Salish on the south, and a variety of sub-cultures. Stevens' solution in creating larger tribes out of the widely dispersed and somewhat heterogeneous congeries of people was to divide the area geographically by drainage system. He appointed a head chief for each of four of the largest river systems: The Lummi-Nooksack, the Skagit, Snoqualmi-Snohomish, and Duwamish. Each head chief was represented by Stevens to be chief over all the people on that drainage system, upriver groups being represented as subordinate bands of the new supertribes.

In a report prepared for Stevens in 1856 (although it was published much later), Gibbs (1877: 179-80) makes the plan explicit.

Below these is the division of which the Dwamish and Sukwamish are the principal bands, occupying Elliott Bay, Bainbridge Island, and a portion of the peninsula between Hood Canal and Admiralty Inlet. Their head chief is Se-aa-thl, or, as it is usually pronounced, Seattle, from whom the town on Elliott Bay has been named. In this connection are also the Samamish, Skopahmish, Sk'tehlmish, St'kamish, and other small bands lying upon the lakes and the branches of Dwamish River, who are claimed by the others as part of their tribe, but have in reality very little connection with them. A very few of these last possess horses, but the majority are river Indians. The aggregate number of the whole was by census 807, which probably falls a little short of the truth. They differ but

slightly from the Niskwalli in language. These tribes were included with all the others of the eastern shore and the islands in the treaty of Mukleteoh, or Point Elliott. A reserve of two sections was retained for them at Port Madison.

3d. The Snohomish, with whom are included the Snokwalmu, Skiwhamish, Sk'tah-le-jum, Kwehtl-ma-mish, and Stolutswhamish, living on the Snohomish and Stolutswhamish Rivers. The Snohomish tribe itself occupies only the country at its mouth and the lower end of Whidbey Island; the upper part of the river belonging to the Snokwalmu, &c. They number 441 souls, and the other bands, collectively, 556. At the time of the treaty they were all placed under Patkanam, the chief of the latter. It is observable that though the connection between them is most intimate, the Snohomish assimilate in dialect to the next tribe, the Skagit, while the Snokwalmu speak the Niskwalli in its purity. In the treaty of Point Elliott, the reservation for this division was fixed at two sections on a small creek emptying into the bay formed by the mouth of the Snohomish River. A central reservation of one township, to include the former, intended for the general agency of the Puget Sound district, and as an ultimate home for all the tribes, was contemplated at the same place. The small bay known as Tulalip Bay, upon which is a saw mill, affords an excellent site for this purpose; and the land in the neighborhood, being easily cleared and of good quality, would enable the Indians in a great measure to subsist themselves. The Snokwalmu and other upper bands of this division possess a

few horses, and are much intermarried with the Yakama Indians, here indiscriminately called Klikatat. They hunt as well as fish; their neighborhood to the mountains and more active and energetic character giving them a superiority in this respect. One of the two principal trails across the Cascade Mountains, that by way of the main Yakama, passes through their country; the Nahchess trail leading from White River.

4th. The Skagits, including the Kikiallu, Nukwatsamish, Tow-ah-ha, Smali-hu, Sakumehu, Miskaiwhu, Miseekwigweelis, Swinamish, and Skwonamish, occupy the remaining country between the Snohomish and Bellingham Bay, with the northern part of Whidbey Island and Perry Island. With them a different dialect prevails, though not so distinct but what they can be understood by those already mentioned. They altogether amount to 1,475, and have been assigned Goliah as head chief. This division have no horses, but are altogether canoe Indians. With the exception of the islands and the immediate shore of the main, their country is altogether unexplored. They formerly had some communication with the Indians beyond the mountains; but it is supposed to have been discontinued in consequences of obstructions to their trails. The Skagit reservation, as agreed upon in the treaty, was the peninsula forming the southeastern extremity of Perry Island.

5th. The Samish, Lummi, Nuksahk, living around Bellingham Bay and the Lummi River. The two former are salt water, the last exclusively river Indians, who as yet have had very little connection with the whites. Collectively,

> these might be called the Nuh-lum-mi. Tsow-its-hut was recognized as their common chief by the treaty, and a reservation made for them of an island at the forks of the river. Altogether they number 680. The languages of the Lummi, at the mouth of the river, and of the Nuk-sahk, a few miles higher up, differ so much as to be almost unintelligible to one another.

The chart accompanying his report (at p. 241), showing the relations of tribes mentioned in the report, was prepared by W. H. Dall, using Gibbs' data. The table graphically sets out the relations of the Duwamish river drainage groups as follows:

(Dwamish) { Sukwamish, Samamish
Skopamish, St'kamish, Sk'tehlmish

Either Dall or the printer who set type for the chart inadvertently omitted the Smulkamish, but it is patent that all these groups were being represented as Dwamish.

In addition to making the plan of tribal organization clear, the report is important because it contains Gibbs' explicit statement, recorded the year after the treaty, that the Skopamish, Stkamish, and Smulkamish were included in the Treaty of Point Elliott. If they had declined to sign, stayed away, or for any reason been omitted, it seems reasonable to suppose that Gibbs, as ethnologist and treaty secretary, would have noted it. He is careful to point out that although the Green River-White River groups are 'claimed by' the salt water Duwamish as part of their tribe, the connection is fictive. The report

makes it clear that the treaty arrangements as to tribal groupings and chiefs do not accurately reflect the realities of native political organization.